

BATTLEGROUND ENVIRONMENT:

Webinar 3 – April 20, 2023

- *Impact Assessment*
- *Interprovincial Matters*



Environmental
Law Centre

Throughout Canada's history, the settler/colonial legal system has facilitated past and ongoing marginalization of Indigenous peoples in Canada. This includes our Constitutional documents and the way that they divide constitutional jurisdiction primarily between our federal and provincial governments leaving out the option for Indigenous Nations to be considered on an equal constitutional footing. As we consider these documents, we must acknowledge how the history of these laws, and their ongoing impacts, affect the First Nations, Métis, and Inuit Peoples who first made these 'jurisdictions' home. The ELC recognizes that environmental and natural resources laws, Indigenous rights and reconciliation are connected. For today, we specifically acknowledge that we are presenting this webinar from Treaty 6 territory - the traditional and ancestral territory of the Cree, Dene, Blackfoot, Saulteaux, Nakota Sioux and Métis Nation.



Environmental
Law Centre



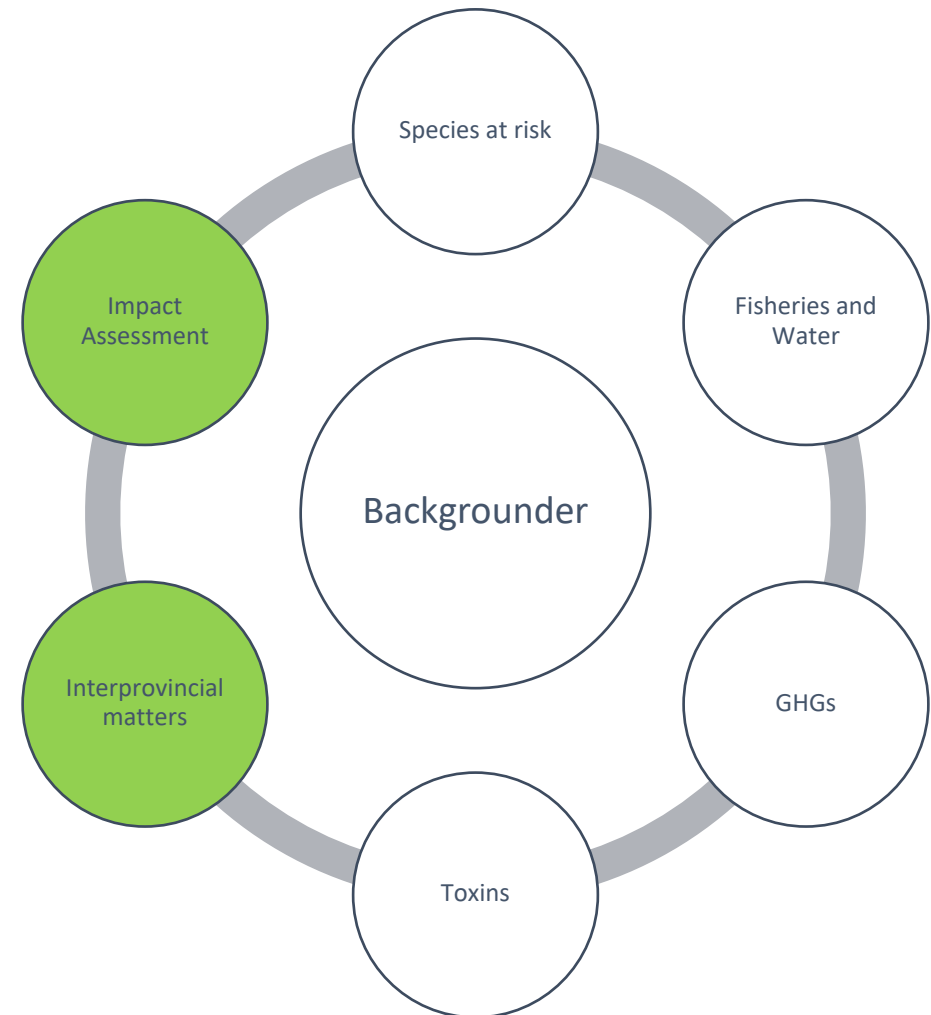
The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since 1982.

Our vision is a society where our laws secure an environment that sustains current and future generations and supports ecosystem health

The Environment & the Constitution Series

The Series

1. Backgrounder to the Canadian Constitution
2. 6 subject matter reports
3. A report exploring interaction of provincial environmental law and regulation with Aboriginal and Treaty rights.



PRESENTATION OUTLINE

Brief Background

Important
Constitutional
Sections

Impact
Assessment

Interprovincial
Matters

A Brief History of the Canadian Constitution

The first iteration of our Constitutional documents was passed on July 1, 1867 with the *British North America Act*



The *Natural Resources Transfer Agreement (Act)* came about in 1930 and elevated the relevance of provincial laws for environmental and resource management

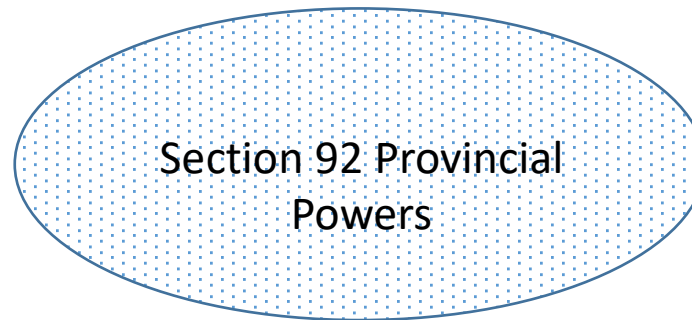
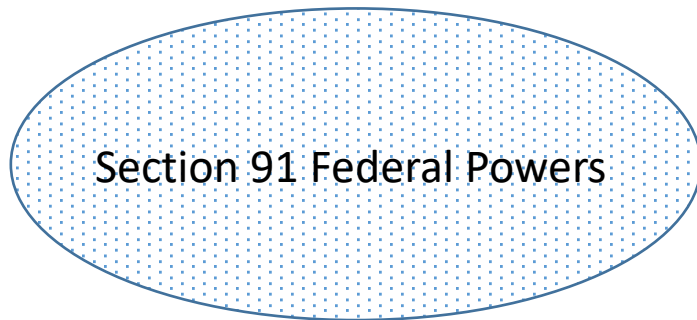


The last major amendment to the Constitution was done in 1982 was completed with the patriation of our constitutional documents, addition of Indigenous rights, creation of the Charter, and inclusion of the amending formulae

The Constitution has remained the supreme law of the land throughout

The Division of Powers

The *Constitution Act, 1867*, sets out a federal system with control divided amongst two levels of government – the federal parliament and provincial governments, each with the jurisdiction to “exclusively” legislate over the enumerated matters



Important Constitutional Provisions: Impact Assessment

No reference to
impact assessment in
the Constitution.

Relies on whether a
project affects
interests that fall
under a specific
head of power

Federally could
mean fisheries,
interprovincial
works or toxic
substances

Provincially could be
local works, public
lands or natural
resources

Important Constitutional Provisions: Interprovincial Works

Are referred to in the Constitution

Section 92(10)
carves out an
exception

Exceptions include
lines of steam,
railways, canals,
telegraphs, and
pipelines

May also apply to
works declared to be
for the general
advantage of Canada

Important Constitutional Provisions: Interprovincial Pollution

Not designated as
either federal or
provincial
jurisdiction in the
Constitution

Federal role is
justified by
provincial inability

Has also resulted in
a number of
cooperative
agreements

Impact Assessment Law



*Environmental Assessment & Review
Process Guidelines Order*



*Canadian Environmental Protection Act,
1992*



*Canadian Environmental Protection Act,
2012*



Impact Assessment Act



Environmental Assessment & Review Process Guidelines Order

Friends of the Oldman River v Canada

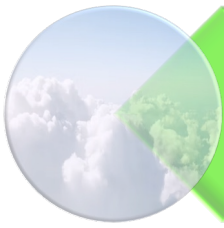
- The environment is not assigned to either level of government and due to the diffuse nature of the environment
- Parliament can weigh the broad environmental repercussions, including socio-economic concerns of a project
- Environmental assessment is “a planning tool that is now generally regarded as an integral component of sound decision-making”
- Federal environmental jurisdiction can extend to two categories of activities – those activities explicitly designated as federal jurisdiction and those with impacts on federal jurisdiction



Canadian Environmental Protection Act, 1992

Quebec v Moses

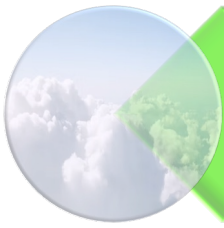
- Does the federal CEAA process apply despite an approval by the province and Treaty administrators?
- “The vanadium mine cannot lawfully proceed without a fisheries permit” **and** “[t]he proponent is unable to obtain, and the federal Minister is unable to issue, a s. 35(2) fisheries permit without compliance with the CEAA.”



Canadian Environmental Protection Act, 1992

MiningWatch v Canada

- Is the environmental assessment track determined by the project as proposed or by the discretionary scoping decision of the federal authority?
- It is not within the discretion of the [responsible authority] to conduct only a screening when a proposed project is listed in the CSL (comprehensive study list).
- Scoping should be based on the minimum scope as proposed by the proponent with “discretion to enlarge the scope when required by the facts and circumstances of the project.”



Canadian Environmental Protection Act, 1992

Greenpeace Canada v Canada

The environmental assessment process “failed to comply with the CEAA” in 3 ways:

1. gaps in the bounding scenario regarding hazardous substance emissions and on-site chemical inventories;
2. in its consideration of spent nuclear fuel; and
3. in the deferral of the analysis of a severe common cause accident.

Olszynski argued that “the most significant” finding from this decision was the “recognition that environmental assessment is an information-gathering tool not just for governments but also and just as importantly for the public”



Impact Assessment Act

Reference re IAA

- ABCA found the Act's application to intraprovincial projects unconstitutional
- Pith and substance: “the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval
- Distinguished from Oldman River, finding that “identifying which government level has the exclusive jurisdiction for the subject activity is not a trap but rather a necessary part of a division of powers analysis.”
- SCC heard Canada's appeal between March 21-22, 2023 with a decision forthcoming

The Future of Impact Assessment

- If the SCC limits federal jurisdiction over IA, the federal government has 2 options: (1) return to a narrower version of the legislation or (2) abandon assessments
- In both instances, a narrowing of the scope of assessments may also undermine the potential for assessments to act as a tool to facilitate more effective incorporation of Indigenous concerns
- To unnecessarily narrow assessment considerations to carved out jurisdictional buckets will only serve to ensure that the environment and ecosystems are not properly considered and protected

Provincial Impact Assessment Law

Provinces have the jurisdiction to regulate impacts on public lands, local works, and undertakings or impacts on their natural resource powers

Environmental Protection and Enhancement Act

- Section 44 sets out the purpose of the environmental assessment process
- Full assessment process is required for mandatory activities which are set out in Schedule 1 of the *Environmental Assessment (Mandatory and Exempted Activities) Regulation*



Alberta Environment and Parks notifies the project proponent that the process will apply to the activity at hand

The Director conducts an initial screening to determine any required next steps in the assessment process

The third step, if required, is the preparation of an environmental assessment report

Referral of the assessment report to the NRCB, the AER, the AUC, or the Minister

Interprovincial Works & Pollution

Or

Constitutional clarity: environmental uncertainty?

Interprovincial works



Supreme Court rejects B.C. appeal of Trans Mountain pipeline case

By Mia Rabson • The Canadian Press

Posted January 16, 2020 3:05 pm · Updated January 17, 2020 1:34 pm



Interprovincial works vs. intraprovincial

- 91(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
- 92(10)
 - Local Works and Undertakings other than such as are of the following Classes:
 - (a)** Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - (b)** Lines of Steam Ships between the Province and any British or Foreign Country:
 - (c)** Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces

Works covered

- Railways, pipelines, communications infrastructure, power lines
- *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#), [1998] 1 S.C.R. 322
 - Undertakings may come within federal jurisdiction in one of two ways: (1) if they constitute a single federal work or undertaking, or (2) if they do not, if they are integral to the core federal transportation or communication facility. (at para 74)
- Historically has come up on in the context of labour and OHS regulations and whether federal or provincial laws apply.

Who's say is it anyway?

- Localized impacts versus interprovincial objectives

British Columbia

Northern Gateway pipeline approval overturned



Federal Court of Appeal finds Canada failed to consult with First Nations on pipeline project

[Jason Proctor](#) · CBC News · Posted: Jun 30, 2016 10:44 AM MDT | Last Updated: June 30, 2016



Business

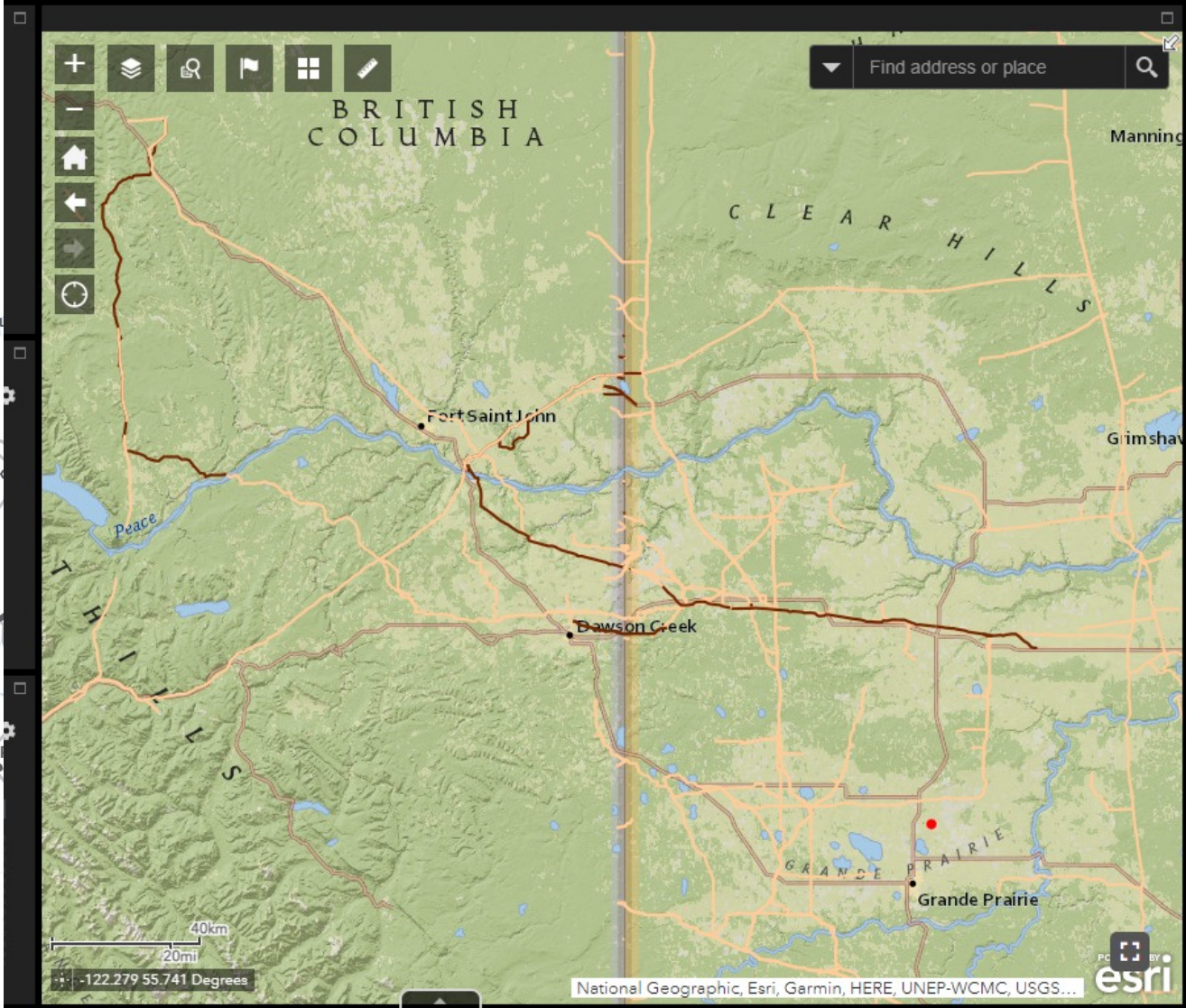
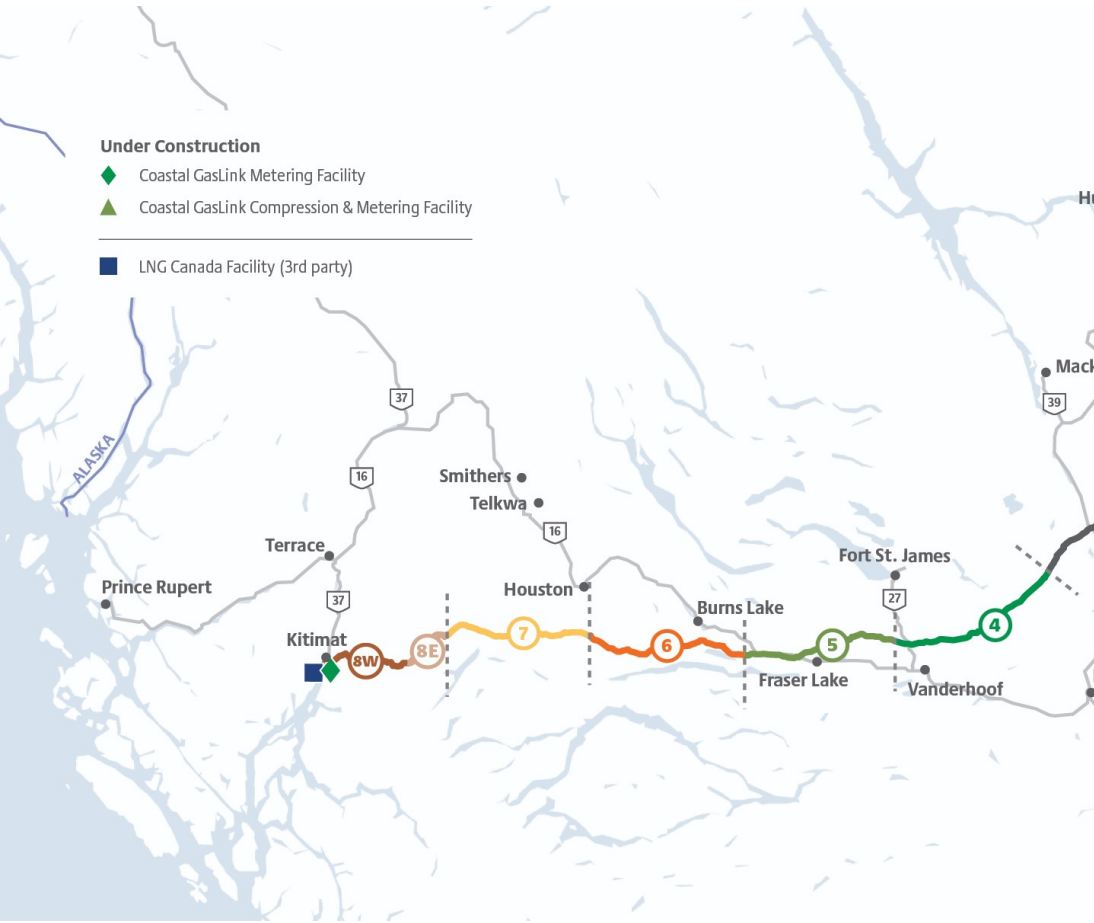
TransCanada pulls plug on Energy East pipeline

Pipeline company opts to kill 2 eastern-focused energy projects

[Pete Evans](#) · CBC News · Posted: Oct 05, 2017 5:49 AM MDT | Last Updated: October 5, 2017



Bits of a whole



Can provinces raise the bar?

- Constitutional principles
 - Pith and substance – what is the provincial law about? If it is about something the federal government has power over the law is invalid.
 - Where provincial law is validly within its power, parts may become inoperable through principles of paramountcy & interjurisdictional immunity

Reference re Environmental Management Act

- Legislation focused on prohibiting and licencing of increased flows of bitumen.
- Reference re Environmental Management Act (British Columbia), 2019 BCCA 181 (CanLII), <https://canlii.ca/t/j0fsc>
 - “incidental” effects are allowable
 - Both levels of government have environmental jurisdiction
 - Co-operative federalism only goes so far
- “The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention.”
- Pith and substance of the EMA is about interprovincial matters and thus not valid.

Paramountcy and Interjurisdictional immunity

- Arises in context of Burnaby (City) v. Trans Mountain Pipeline ULC, 2015 BCSC 2140 (CanLII), <https://canlii.ca/t/gm6wf>
- Paramountcy
 - “Paramountcy renders the provincial law inoperative to the extent of the inconsistency or conflict
 - inconsistency or a conflict between federal and the provincial law. A conflict or inconsistency can arise if there is an ***impossibility of dual compliance or a frustration of a federal purpose***.
 - frustrate the purpose of the federal law.
 - NEB 23 October 2014 Ruling No. 40 [A097] and adopted by BCSC
- Interjurisdictional immunity
 - ***undertakings falling within federal jurisdiction, such as the [pipeline] Project, are immune from otherwise valid provincial laws (and by extension municipal bylaws) that would have the effect of impairing (not just affecting) a core competence of Parliament or vital part of the federal undertaking.*** First, it must be determined if the provincial law trenches on the protected core of a federal competence. If so, it must be determined if the provincial law’s effect on the exercise of the protected federal power is sufficiently serious to invoke the doctrine of interjurisdictional immunity.
 - NEB 23 October 2014 Ruling No. 40 [A097] and adopted by BCSC

Interprovincial pollution

- Transboundary pollution is ubiquitous
- Pollution by air and water are often authorized provincially
- *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477, <<https://canlii.ca/t/1z6gm>>

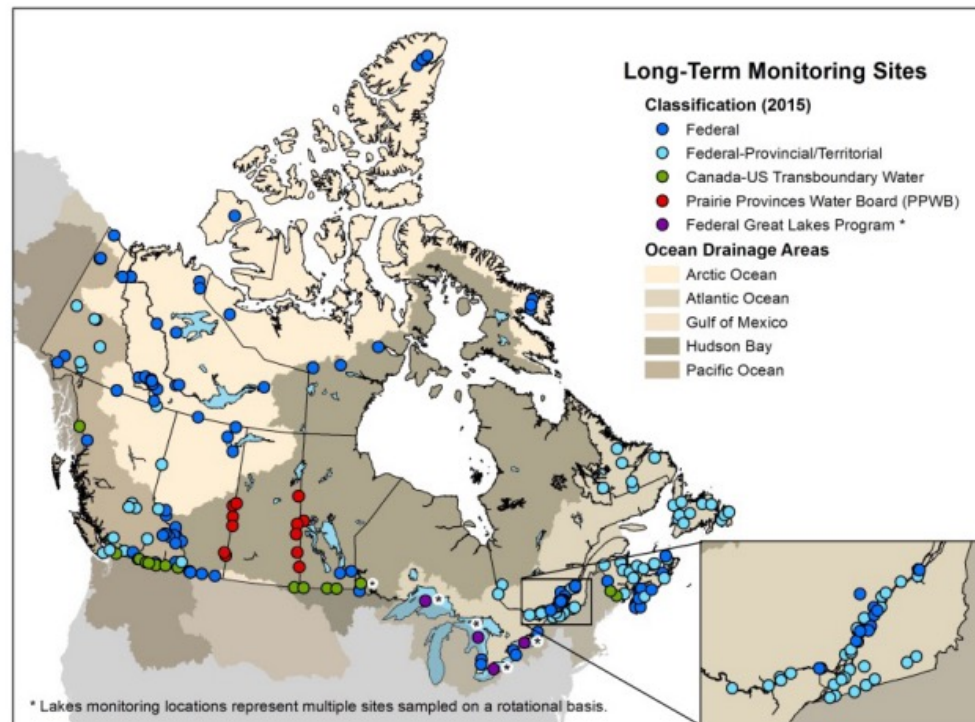


Interprovincial Co-operatives (SCC, 1976)

- Manitoba sought to enable recovery for harms for releases of extra-provincial sources of mercury (ON/SK)
 - Court observes that a province cannot validly licence injurious effects (i.e. harm) outside its borders (as it would invalidate a cause of action/tort in another jurisdiction)
 - Interprovincial pollution is a “national concern”
 - Question of provable harm?
 - Where the province cannot, the federal government has jurisdiction
- Unlike the CER (formerly the NEB) we see no regulator for interprovincial pollution.

Federal role – Canada Water Act

Figure 3: Long-term water quality monitoring sites

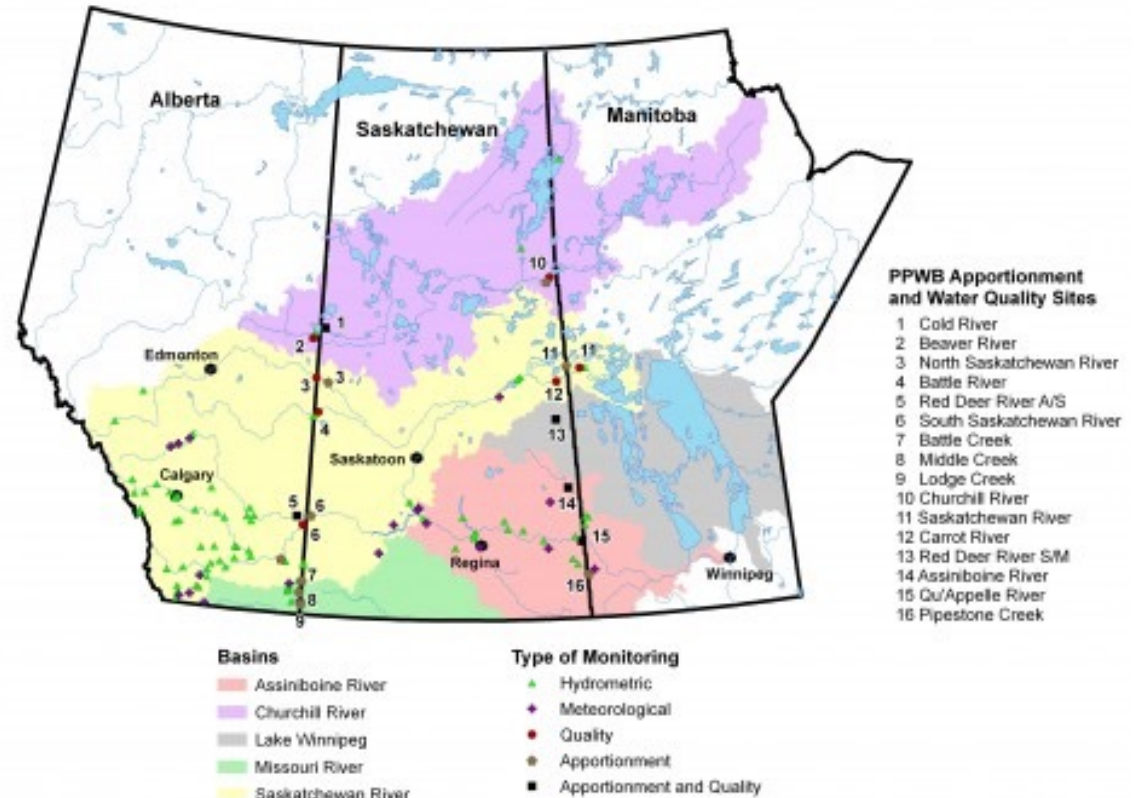


Canada Water Act Annual Report for April 2015 to March 2016

- Established the ability to enter agreements
- Focus is monitoring and research
- Enables the creation water quality management areas where “inter-jurisdictional waters has become a matter of urgent national concern” and designation of a water quality management agency (to carry out programs)”

Interprovincial pollution – surface water approaches

- Prairie Provinces Water Board and the Master Agreement on Apportionment
- Agreement between Canada, Alberta, Saskatchewan and Manitoba (arranged by Orders in Council)
- **Water Quality**
- **6.** The parties mutually agree to consider water quality problems; to refer such problems to the Board; and to consider recommendations of the Board thereon.
- **Schedule E – Agreement on Water Quality**
 - ...foster and facilitate interprovincial water quality management among the parties that encourage the protection and restoration of the aquatic environment.
 - Sets water quality objectives.
 - If water quality “not within acceptable limit or limits when compared to agreed objective” ...”reasonable and practical measures will be taken in by the party in whose jurisdiction” the pollution originates.



Monitoring and soft approaches

- Example review of pesticides
- Recommendations to PMRA and CCME
- Dicamba and MCPA over objectives for irrigation

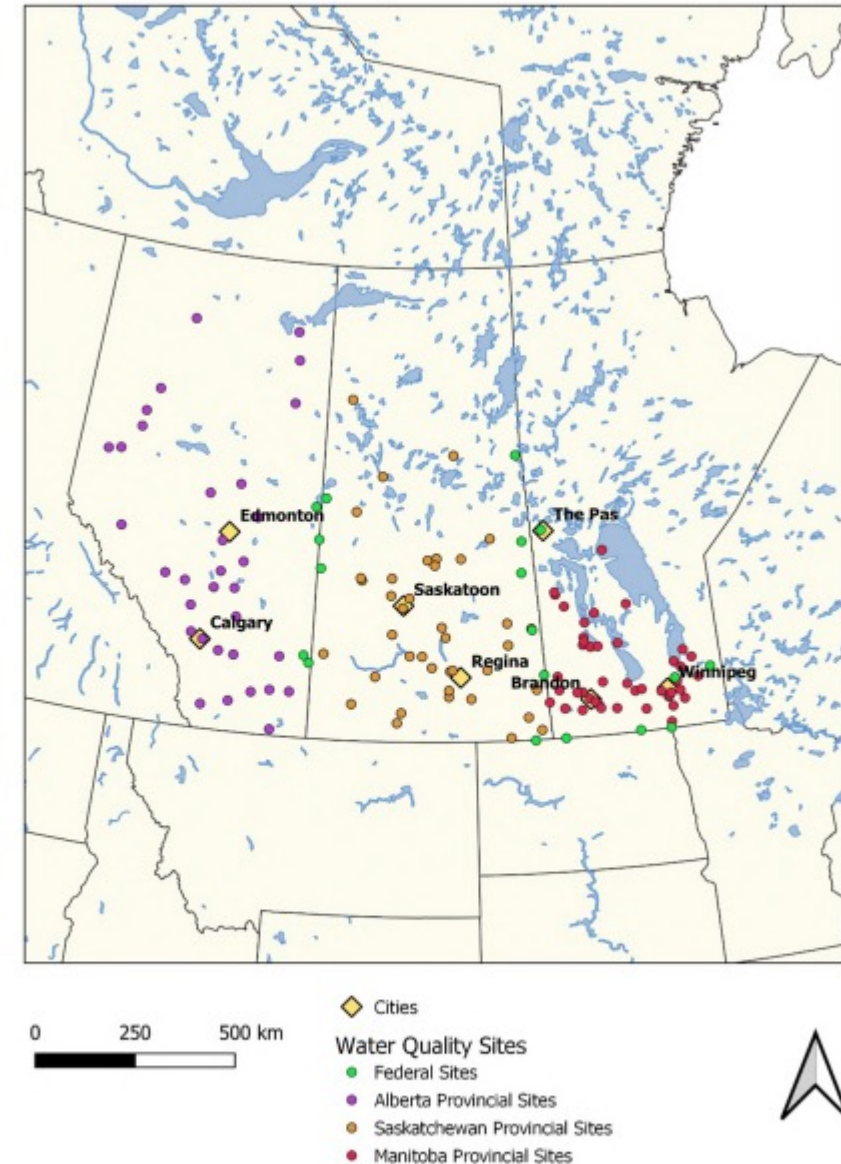


Figure 1 Water Quality Monitoring Locations across the Canadian Prairies.

Lake Winnipeg: Nutrients and Loads, Status Report, 2022, Government of Manitoba
https://www.gov.mb.ca/sd/water/pubs/water/lakes-beaches-rivers/lake_winnipeg_nutrients_status_report.pdf

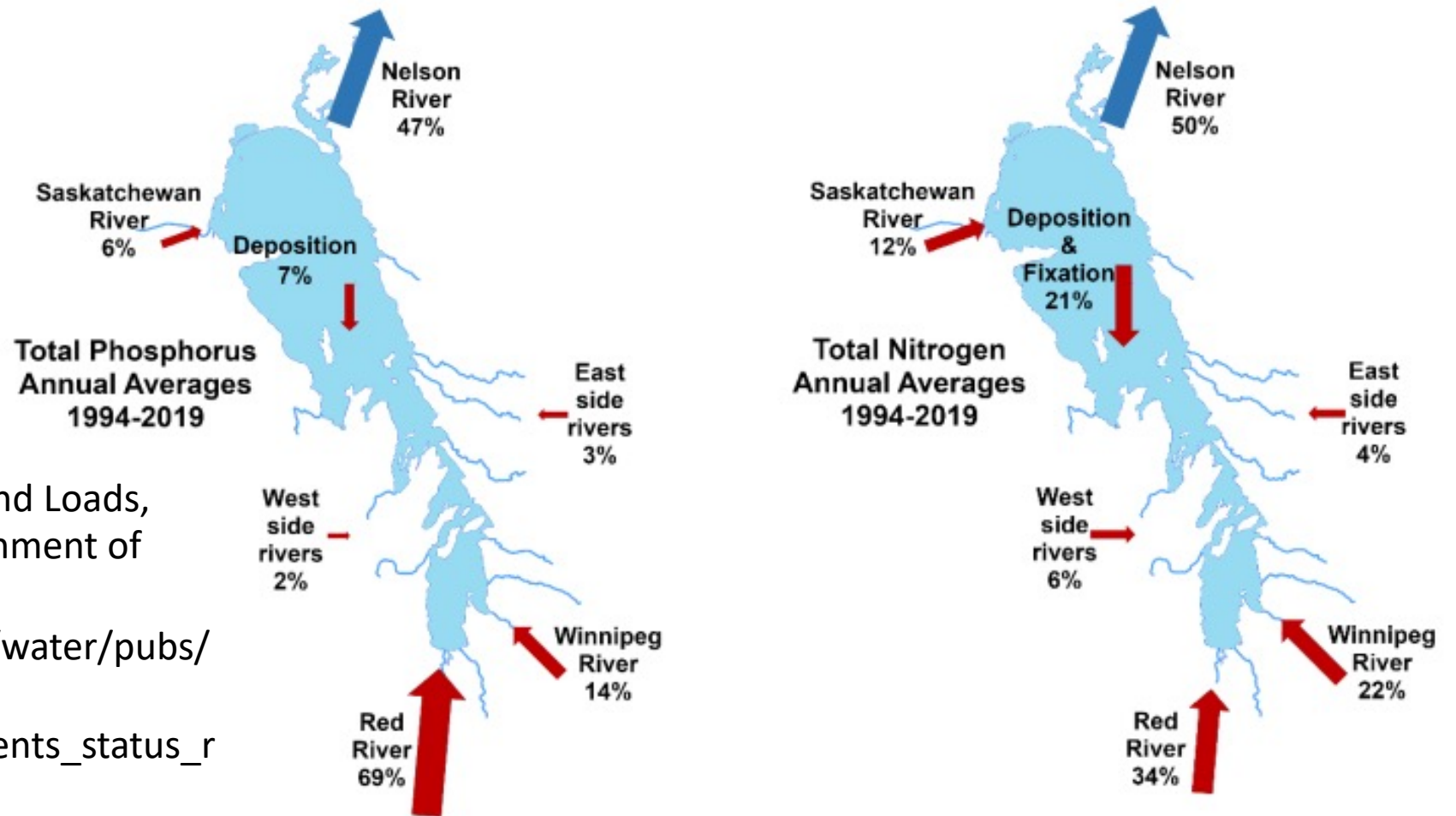
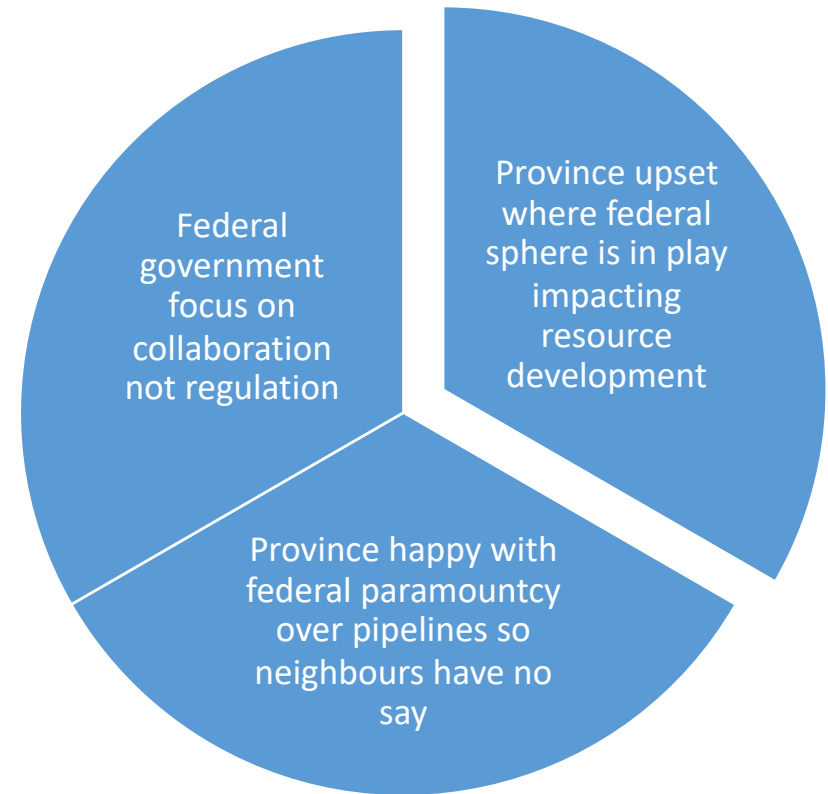
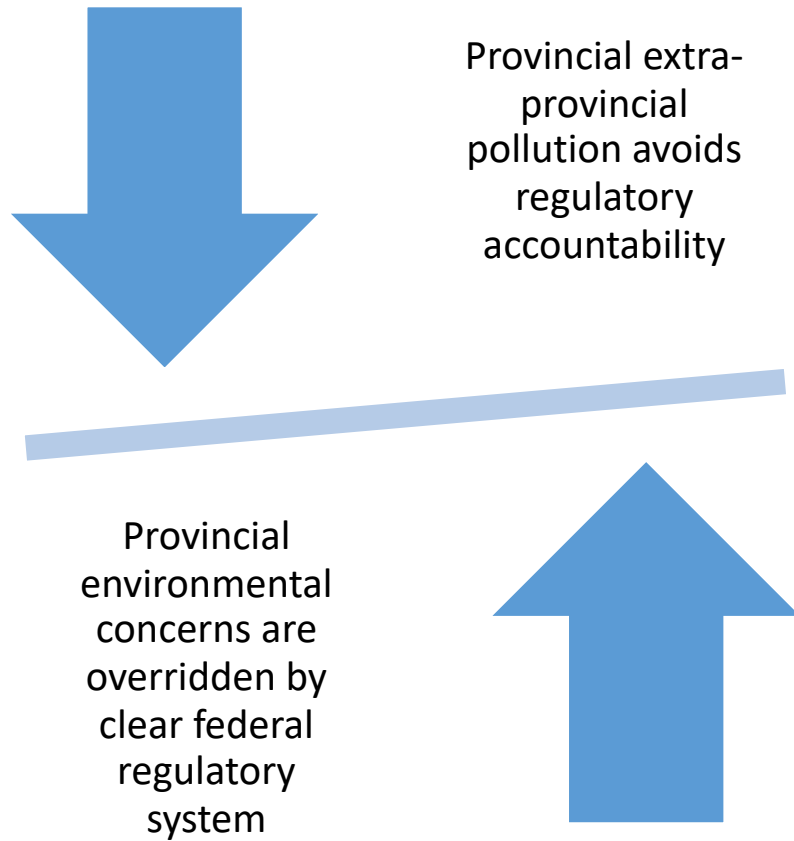


Figure 3. Average percent phosphorus and nitrogen loading from the major contributors to Lake Winnipeg (1994-2019 average).

Summary



Questions?

As a charity, the Environmental Law Centre depends on your financial support.

Your support makes a difference!

*Donate online today at www.elc.ab.ca or
contact elc@elc.ab.ca about corporate sponsorships*

Charitable registration 11890 0679 RR0001

Contact the ELC

Telephone: (780) 424-5099

Fax: (780) 424-5133

Toll-free: 1-800-661-4238

Email:

junger@elc.ab.ca

rkauffman@elc.ab.ca

Website: www.elc.ab.ca

Blog: <http://elc.ab.ca/blog/>

Facebook: <http://www.facebook.com/environmentallawcentre>

Twitter: https://twitter.com/ELC_Alberta

To sign up for the ELC e-newsletter visit:

<http://elc.ab.ca/newsandmedia/news/>

Photos courtesy
of Unsplash

NEXT UP: The intersection of environmental and Aboriginal law